

1 HONORABLE RICHARD A. JONES
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11 UNITED STATES DISTRICT COURT
12 WESTERN DISTRICT OF WASHINGTON
13 AT SEATTLE

14
15 Christopher King, A/K/A KINGCAST, and
16 JOHN NOVAK

17 Plaintiffs,

18 v.

19 LIQUOR AND CANNABIS BOARD OF
20 THE STATE OF WASHINGTON; JANE
21 RUSHFORD, Chair of the Liquor and
22 Cannabis Board; RICK GARZA, Director
23 of the Liquor and Cannabis Board; JAY
24 INSLEE, Governor of Washington;
25 ROBERT FERGUSON, Washington
26 Attorney General; WILLIAM P. BARR,
27 United States Attorney General; and
28 OFFICE OF NATIONAL DRUG
CONTROL POLICY

Defendant.

No. 2:20-cv-01494-RAJ

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1 2, Dkt. # 28; (3) Plaintiffs' Motion for Extension of Time to Respond to Motion to
 2 Dismiss, Dkt. # 29; and (4) Plaintiffs' Motion for Leave to File Second Amended
 3 Complaint, Dkt. # 71. Having reviewed the parties' briefing, the remaining record, and
 4 relevant law, the Court **DENIES** Plaintiffs' Motion for Injunctive Relief, Dkt. # 2;
 5 **GRANTS** Plaintiffs' Motion for Extension of Time to Respond to Motion to Dismiss,
 6 Dkt. # 29; **GRANTS** Defendants' Motion to Dismiss, Dkt. # 28; and **DENIES** as moot
 7 Plaintiffs' Motion for Leave to File Second Amended Complaint, Dkt. # 71.

8 II. BACKGROUND

9 Plaintiff Christopher King, A/K/A Kingcast, is a recreational cannabis user and
 10 Plaintiff John Novack (collectively, "Plaintiffs") is a medical marijuana user. Dkt. # 1 at
 11 2. Both individuals "routinely purchase cannabis products and pay[] the requisite sales
 12 tax to do so." *Id.* They are members of the Justice & Accountability in Government for
 13 Washington, a state lobbying group whose mission is "to change the culture and forge
 14 new laws, if necessary, to achieve equality of rights," among other things. *Id.* The
 15 group's stated purpose is "to educate persons as to their constitutional rights and to take
 16 all lawful actions to secure the exercise thereof." *Id.*

17 On October 9, 2020, Plaintiffs filed a complaint against Defendants Washington
 18 State Liquor and Cannabis Board ("LCB"), Jane Rushford, Chair of LCB, and Rick
 19 Garza, Director of LCB. Dkt. # 1. The LCB is a state agency responsible for issuing
 20 licenses to producers, processors, and retailers of marijuana and adopting rules related to
 21 labeling, safety protocols, and methods of production, among others. Dkt. # 28 at 2;
 22 RCW 69.50.342. Plaintiffs allege that LCB officers cannot enforce criminal cannabis
 23 statutes because Washington state law limits the authority of LCB peace officers to the
 24 enforcement of liquor statutes. Dkt. # 7 at 6 (citing RCW 66.44.010). Plaintiffs also
 25 allege that LCB is acting *ultra vires* by allowing its agents, who do not have Basic Law
 26 Enforcement Academy ("BLEA") certification or training, to enforce criminal cannabis
 27 statutes. Dkt. # 7 at 7 (citing RCW 10.93). Plaintiffs further claim that "the LCB

1 imperils cannabis users by failing to conduct periodic testing to detect impurities, mold
2 and other contaminants.” *Id.* at 13. Plaintiffs request the following forms of relief:

3 (1) Preliminary and permanent injunctions against non BLEA-trained personnel
4 from assuming any enforcement authority;

5 (2) Preliminary and permanent injunctions against pending enforcement cases
6 brought by LCB agents who did not have BLEA training prior to the initiation of
7 cases;

8 (3) A recall of all criminal cases that were brought against anyone “under the
9 artificially-enlarged LCB ambit such that any case involving a non BLEA-trained
10 Agents be mooted, *nunc pro tunc*”;

11 (4) An order of prohibition preventing LCB from using the word “police” to
12 describe its agents unless every LCB agent has undergone BLEA certification or
13 superseding legislation confers such status to all LCB agents;

14 (5) An order establishing “known and published testing regimen with respect to
15 pesticides, herbicides, mold, fungus, and other “hot pot” issues that recklessly
16 endanger the health of Washington’s Cannabis consumers”; and

17 (6) Costs and other relief as the Court may deem appropriate.

18 *Id.*

19 The same day, Plaintiffs filed a motion for preliminary injunction seeking this
20 relief. Dkt. # 2. A week later, Plaintiffs filed an amended complaint expanding its list of
21 defendants to include Jay Inslee, Governor of Washington; Robert Ferguson, Washington
22 State Attorney General; William P. Barr, United States Attorney General; and the Office
23 of National Drug Control Policy (“ONDCP”). Dkt. # 7. Plaintiffs assert the same claims
24 and seek the same relief requested in their original complaint. *Id.*

25 On November 19, 2020, Defendants LCB, LCB Chair Rushford, LCB Director
26 Garza, Washington Governor Inslee, and Washington State Attorney General Ferguson
27 (collectively, “State Defendants”) moved to dismiss the action for lack of jurisdiction

1 under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Dkt. # 28. Plaintiffs failed
 2 to timely respond by the deadline of December 7, 2020.

3 Almost two months later, on February 1, 2021, Plaintiffs filed a motion seeking
 4 additional time to file a response, claiming that “they did not see any Notification of a
 5 Motion to Dismiss.” Dkt. # 29. State Defendants opposed an extension. Dkt. # 34.

6 III. DISCUSSION

7 The Court will address Plaintiffs’ motion seeking preliminary injunction, Dkt. # 2,
 8 followed by Plaintiffs’ motion for an extension of time to respond, Dkt. # 29. The Court
 9 will then address Defendants’ motion to dismiss, Dkt. # 28, and Plaintiffs’ motion for
 10 leave to file a second amended complaint, Dkt. # 71.

11 A. Motion for Preliminary Injunction

12 Preliminary injunctive relief is “an extraordinary remedy that may only be
 13 awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter v. Nat.
 14 Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). As an extraordinary remedy, it is “never
 15 awarded as of right.” *Id.* The purpose of a preliminary injunction is to preserve the
 16 status quo and the rights of the parties until a final judgment on the merits can be
 17 rendered. *See U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010).
 18 The legal standard for a preliminary injunction requires plaintiffs to show that they are
 19 (1) likely to succeed on the merits, (2) likely to suffer irreparable harm in the absence of
 20 preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in
 21 the public interest. *See Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009).

22 The Ninth Circuit makes clear that a showing of immediate irreparable harm is
 23 essential for preliminary injunctive relief. *See Caribbean Marine Servs. Co. v. Baldridge*,
 24 844 F.2d 668, 674 (9th Cir. 1988) (“Speculative injury does not constitute irreparable
 25 injury sufficient to warrant granting a preliminary injunction.”). To obtain injunctive
 26 relief, “plaintiffs must establish that irreparable harm is *likely*, not just possible, in order
 27 to obtain a preliminary injunction.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d

1127, 1131 (9th Cir. 2011).

2 Here, Plaintiffs claim that “[t]o be subject to investigation, arrest and prosecution
 3 by persons or an entity not authorized to do so inherently involves Irreparable Harm to
 4 people whose entire professional reputations stand to be destroyed.” Dkt. # 2 at 10.
 5 Plaintiffs’ contend that injunctive relief “is necessary because without it Plaintiffs and the
 6 general populous [sic] are subject to the Due Process 5th/14th Amendment Concerns under
 7 42 U.S.C § 1983.” *Id.* at 9.

8 Although it is “well established that the deprivation of constitutional rights
 9 unquestionably constitutes irreparable injury,” *Melendres v. Arpaio*, 695 F.3d 990, 1002
 10 (9th Cir. 2012), the Court finds that Plaintiffs’ hypothetical risk of injury does not.
 11 Plaintiffs’ concern about possible harm to unidentified individuals in the general
 12 populace resulting from a hypothetical investigation, arrest, and prosecution is purely
 13 speculative. Plaintiffs have not alleged that they have been unlawfully detained or
 14 prosecuted by LCB officers nor established that they are at substantial risk of such
 15 detention or prosecution. Plaintiffs thus fail to establish a *likelihood* of irreparable harm
 16 or demonstrate a risk of *immediate* irreparable harm in the absence of preliminary
 17 injunctive relief.

18 In contrast, the Supreme Court in *Elrod v. Burns* concluded that the respondents
 19 had established injury for purposes of injunctive relief based on a deprivation of
 20 constitutional rights by showing that they had been discharged or threatened with
 21 discharge from their public service jobs based solely on their political affiliation or
 22 nonaffiliation. 427 U.S. 347, 349 (1976). The Supreme Court held that injunctive relief
 23 was appropriate because their “First Amendment interests were either threatened or in
 24 fact being impaired.” *Id.* at 373. The violation of constitutional rights was an immediate
 25 harm: the respondents were being discharged or threatened with discharge at the time
 26 relief was sought. *Id.* This clearly demonstrates a likelihood of immediate of harm to the
 27 party seeking an injunction.

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1 The Ninth Circuit in *Melendres v. Arpaio* similarly found that an allegation of
2 constitutional rights violations constituted irreparable harm. 695 F.3d at 1002. The
3 plaintiffs in *Melendres* had been unlawfully detained pursuant to a policy of racial
4 profiling of Latino persons and practice of pretextually stopping and detaining Latino
5 drivers. *Id.* at 994. The defendants, a sheriff and sheriff's office, represented that they
6 had authority to detain individuals solely based on their immigration status even though it
7 was not a criminal matter, and would continue to operate under that belief. *Id.* at 1002.
8 Based on these representations, the district court concluded that the plaintiffs were likely
9 to be stopped or unlawfully detained again. *Id.* This likelihood of injury was sufficient
10 to warrant a preliminary injunction. *Id.* The Ninth Circuit affirmed. *Id.*

11 The allegations here are speculative; they do not establish a likelihood of
12 immediate irreparable harm. A general concern about the possibility of constitutional
13 rights violations does not warrant the extraordinary remedy of preliminary injunctive
14 relief. Absent a showing of irreparable harm, the Court need not consider the other
15 *Winter* factors. The Court therefore **DENIES** Plaintiffs' motion for preliminary
16 injunction.

17 **B. Plaintiffs' Motion for Continuance to Respond to Motion to Dismiss**

18 The Court considers Plaintiffs' Motion for Continuance as a motion for relief from
19 a deadline under Local Rule 7(j) of the Western District of Washington. A motion for
20 relief from a deadline "should, whenever possible, be filed sufficiently in advance of the
21 deadline to allow the court to rule on the motion prior to the deadline." LCR 7(j). In the
22 event of an unforeseen emergency, the parties are instructed to contact the adverse party,
23 meet and confer regarding an extension, and file a stipulation with the court. *Id.* In the
24 event of a true emergency, the parties are expected to stipulate to an extension. *Id.*

25 Here, the State Defendants filed a motion to dismiss on November 19, 2020. Dkt.
26 # 28. The deadline for Plaintiffs to file a response was December 7, 2020. LCR 7(d)(3).
27 Plaintiffs failed to file a response or a motion for relief from the deadline before the
28 ORDER – 6

1 deadline. Plaintiffs did not move for relief from the deadline until February 1, 2021,
 2 almost two months after the deadline had passed. Dkt. # 29. Defendants filed an
 3 opposition to the motion a week later. Dkt. # 34.

4 In their motion seeking an extension of time to file their response, Plaintiffs
 5 concede that there was no emergency situation precluding their timely filing of a
 6 response to Defendants' motion to dismiss. Dkt. # 35 at 2. Instead, they explain, "it was
 7 simply that Plaintiffs did not see the State Defendants' Motion in their emails and when
 8 Plaintiff King scanned down the ECF online after the Motion was filed he apparently had
 9 not gone all the way to the bottom and so he missed it." Dkt. # 35 at 2.

10 The Court finds this explanation untenable, particularly given the fact that
 11 Defendants informed Plaintiffs of their intent to file a motion to dismiss and met and
 12 conferred with Plaintiffs to discuss the merits prior to filing the motion. Dkt. # 28-1 ¶ 4;
 13 Dkt. # 34 at 2. Plaintiff King was then served with the motion to dismiss via e-filing, and
 14 Plaintiff Novack was served via First Class U.S. Mail. Dkt. # 34 at 2. Plaintiffs' failure
 15 to respond because they simply "did not see" it is inexcusable.

16 Nevertheless, the Court's preference for judgment on the merits will, in this
 17 instance, preclude denial for failure to timely respond or seek relief from a deadline. The
 18 Court will not, however, hesitate to strike or deny any untimely pleadings in the future.
 19 The Court **GRANTS** Plaintiffs' Motion for Continuance.

20 **C. Defendants' Motion to Dismiss**

21 Defendants move to dismiss Plaintiffs' claims for lack of subject matter
 22 jurisdiction under Rule 12(b)(1) and personal jurisdiction under Rule 12(b)(2). Dkt. # 28
 23 at 2. Defendants first argue that there is no subject matter jurisdiction because the
 24 amended complaint relies on the resolution of questions of state law, not federal law. *Id.*
 25 at 1-2. Alternatively, Defendants argue that the Eleventh Amendment or qualified
 26 immunity bars suit against all Defendants. *Id.* at 4. The Court will consider each
 27 argument in turn.

1 **1. *Subject Matter Jurisdiction***

2 District courts have “original jurisdiction of all civil actions arising under the
3 Constitution, laws, or treatises of the United States.” 28 U.S.C. § 1331. “The party
4 asserting federal subject matter jurisdiction bears the burden of proving its existence.”
5 *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). When
6 reviewing a motion to dismiss, a district court “must accept all factual allegations of the
7 complaint as true and draw all reasonable inferences in favor of the nonmoving party.”
8 *Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002) (internal citation and
9 quotations omitted). To determine whether a case arises under § 1331, a court must
10 consider “if a well-pleaded complaint establishes either that federal law creates the cause
11 of action or that the plaintiff’s right to relief necessarily depends on resolution of a
12 substantial question of federal law.” *Empire Healthchoice Assur., Inc. v. McVeigh*, 547
13 U.S. 677, 690 (2006) (internal quotations and citation omitted).

14 Even accepting Plaintiffs’ factual allegations as true, the Court finds that Plaintiffs
15 have not met their burden to establish federal subject matter jurisdiction. As Defendants
16 correctly note, Plaintiffs’ claims and requested relief all depend on the interpretation of
17 Washington state laws. Dkt. # 28 at 5. Plaintiffs allege that Defendants run afoul of state
18 laws, specifically RCW 66.44.010, which provides enforcement authority only with
19 respect to liquor regulations, and RCW 69.50.500, which excludes LCB officers from
20 engaging in peace officer actions. Dkt. # 7 ¶¶ 14-21. State law, as opposed to federal
21 law, “creates the cause[s] of action” asserted by Plaintiffs. *Cook Inlet Region, Inc. v.*
22 *Rude*, 690 F.3d 1127, 1130 (9th Cir. 2012). Plaintiffs’ conclusory allegations to the
23 contrary are unavailing.

24 The Court must next determine whether the plaintiff’s right to relief necessarily
25 depends on resolution of a substantial question of federal law. 547 U.S. at 690. In their
26 request for relief, Plaintiffs seek to enjoin behavior that, they assert, is not permitted
27 under Washington law, to establish a testing regimen for cannabis products, and to ensure
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1 that LCB officers are complying with the state laws. Dkt. # 7 at 17-18. Their right to
2 relief wholly depends on resolution of Washington state law, not a “substantial question
3 of federal law.” 547 U.S. at 690. Failing to establish that federal law creates the cause of
4 action or that Plaintiffs’ right to relief “necessarily depends on resolution of a substantial
5 question of federal law,” Plaintiffs fail to demonstrate that the case invokes federal
6 question jurisdiction under 28 U.S.C. § 1331.

7 Furthermore, the Court notes that Plaintiffs voluntarily dismissed federal
8 Defendants United States Attorney General William Barr and the ONDCP on April 25,
9 2021. Dkt. # 56. The remaining defendants are a state agency and state officials.
10 Plaintiffs’ withdrawal of all federal defendants undermines Plaintiffs’ argument that the
11 “interplay between the State and Federal authorities clearly shows the presence of a
12 Federal Questions pursuant to 28 USC § 1331.” Dkt. # 32 at 2. In the absence of federal
13 question jurisdiction under § 1331, the Court lacks subject matter jurisdiction over
14 Plaintiffs’ claims.

15 **2. Personal Jurisdiction**

16 Defendants contend that, in the alternative, the Court should dismiss all claims
17 against Defendants because the Eleventh Amendment bars all claims against the LCB as
18 a state agency and the named state officials in their official capacities. Dkt. # 28 at 6-7.
19 The Eleventh Amendment limits the power of federal courts to decide certain claims
20 against states. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984). It
21 states that “[t]he Judicial power of the United States shall not be construed to extend to
22 any suit in law or equity, commenced or prosecuted against one of the United States by
23 Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. Const.
24 amend. XI. In considering a motion to dismiss based on personal jurisdiction, a court
25 must take all uncontested allegations in the complaint as true. *Schwarzenegger v.*
26 *Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

27 Defendants correctly note that a state’s immunity under the Eleventh Amendment
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1 extends to its agencies and departments. *See* 465 U.S. at 100. Defendant LCB, a state
2 agency, created pursuant to RCW 66.08.012, is immune from suit in federal court unless
3 it consents to such an action. *See id.* Because the LCB has not waived its immunity, the
4 Court lacks jurisdiction over claims against the LCB. The LCB is therefore dismissed.
5 Eleventh Amendment immunity is similarly extended to state officials who allegedly
6 violated state law in carrying out their official responsibilities. *Id.* at 121. Plaintiffs'
7 claims against the Governor of Washington, the Attorney General of Washington, and the
8 LCB's Chair and Executive Director in their official capacities are thereby dismissed.

9 With respect to Plaintiffs' claims against the named state officials in their personal
10 capacities, Defendants assert that they are entitled to qualified immunity. Dkt. # 28 at 7-
11 8. Qualified immunity "shields Government officials from liability for civil damages
12 insofar as their conduct does not violate clearly established statutory or constitutional
13 rights." *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (internal citation omitted). To
14 determine whether state officials are entitled to qualified immunity, the Court must
15 consider whether the facts alleged by Plaintiffs make out a violation of a constitutional
16 right and whether the right at issue was "clearly established" at the time of the alleged
17 violation. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The Court first considers
18 whether facts alleged by Plaintiffs, pursuant to Rule 12(b)(6), establish a violation of a
19 constitutional right. *Id.*

20 In the amended complaint, Plaintiffs set forth their argument that LCB has no
21 authority to enforce cannabis, citing Washington statutes and failed legislative efforts of
22 the LCB to expand their authority. Dkt. # 7 ¶¶ 14-22. Plaintiffs then briefly describe the
23 observations of a declarant who would testify that his role as an LCB agent was
24 "essentially a fake cop." *Id.* ¶¶ 23-24. Next, Plaintiffs again describe historical efforts to
25 expand the authority of LCB agents—through repeated attempts to amend statutes—and
26 the limitations of current statutes. *Id.* ¶¶ 25-48. Plaintiffs then shift focus to describe
27 LCB's failure to conduct safety testing of cannabis products and highlight the dangers of
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1 such a failure. *Id.* ¶¶ 49-54. They briefly describe Plaintiff Novak’s health issues, his
2 reliance on medical marijuana, and the difficulties in obtaining information about
3 different strains of marijuana due to changes in state law. *Id.* ¶¶ 55-62. Finally, Plaintiffs
4 note that ten legislators have “condemned the overall toxic and dysfunctional atmosphere
5 at LCB,” that the Washington State Attorney General “has successfully prosecuted a case
6 involving ultra vires misconduct by the U.S. Post Office,” and “the LCB has already
7 publicly acknowledged the fact that they [sic] Agency lacks authority and that its Agents
8 need to undergo BLEA training.” *Id.* ¶¶ 64-66.

9 In these almost ten pages of factual allegations, however, Plaintiffs fail to allege
10 any specific actions taken by the named state officials in their personal capacity that
11 constitute a deprivation of constitutional rights. They express concern about potential
12 misuse of authority and *ultra vires* activity, but allege no facts demonstrating such
13 activity. The allegations are conclusory, speculative, and fail to demonstrate a violation
14 of substantive and procedural due process violations under the Fifth and Fourteenth
15 Amendment based on the conduct of these officials. *See Bell Atl. Corp. v. Twombly*, 550
16 U.S. 544, 545 (2007) (holding that “a plaintiff’s obligation to provide the ‘grounds’ of his
17 ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic
18 recitation of a cause of action’s elements will not do.”) Absent factual allegations
19 showing how the named state officials have deprived Plaintiffs of their constitutional
20 rights, the Court finds that Defendant state officials are entitled to qualified immunity.
21 As such, claims against the remaining Defendants are dismissed. Defendants’ motion to
22 dismiss is **GRANTED**.

23 Plaintiffs may, however, amend the complaint. “Unless it is absolutely clear that
24 no amendment can cure the defect . . . a *pro se* litigant is entitled to notice of the
25 complaint’s deficiencies and an opportunity to amend prior to dismissal of the action.”
26 *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995) (per curiam). The Court
27 therefore grants Plaintiffs **twenty-one (21) days** to file an amended complaint that states
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1 a valid claim for relief consistent with this Order. If Plaintiffs fail to timely comply with
2 this Order by filing an amended complaint that corrects the deficiencies noted above, the
3 Court will dismiss this action without leave to amend. For these reasons, the Court
4 **DENIES** as moot Plaintiffs' motion for leave to file a second amended complaint, Dkt.
5 # 71.

6 **IV. CONCLUSION**

7 For the reasons stated above, the Court **ORDERS** as follows:

8 (1) Plaintiffs' motion for injunctive relief, Dkt. # 2, is **DENIED**;
9 (2) Defendants' motion to dismiss, Dkt. # 28, is **GRANTED**. Within 21 days of
10 this Order, Plaintiffs may file an amended complaint consistent with this Order.
11 (3) Plaintiffs' motion for extension of time to respond, Dkt. # 29, is **GRANTED**;
12 (4) Plaintiffs' motion for leave to file a second amended complaint, Dkt. # 71, is
13 **DENIED** as moot.

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15 DATED this 8th day of September, 2021.

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The Honorable Richard A. Jones
United States District Judge